NO. 80195-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RONALD S. QUISMUNDO,

Petitioner.

SECOND SUPPLEMENTAL BRIEF OF RESPONDENT

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I. ISSUES

1. Should relief be granted on an issue not properly before this Court?

2. Is "willful contact" an element of the crime of violation of a protective order as proscribed by RCW 26.50.110(1)(a)(i)?

II. STATEMENT OF THE CASE

The facts are adequately set out in the State's Supplemental Brief and Motion to Strike Issue First Raised in Supplemental Brief with the following additions:

After the State rested its case-in-chief, petitioner moved to dismiss the charge because the amended information was missing an essential element of the crime. The State responded with a motion to re-open and file a second amended information. 8/22 RP 85. The trial court granted the State's motion. 8/22 RP 89-90. Petitioner was then arraigned on the second amended information. 8/23 RP 103-04. The only difference between the amended information and the second amended information was that the phrase "did violate the orders" was added. RP 103, compare CP 53 with CP 48. The State informed the court, "[Petitioner's counsel] has a copy [of the second amended information] and tells me I've done it right this time." 8/23 RP 103.

III. ARGUMENT

A. INTRODUCTION.

Petitioner did not petition this Court for review of the sufficiency of the second amended information. This Court should not consider granting relief for an issue not properly before it.

RCW 26.50.110(1)(a)(i) punishes "a violation" of the restraint provision of a protective order prohibiting contact with a protected party. "Willful violation" is not an element of violation of a domestic violence protective order under RCW 26.50.110(1)(a)(i).

B. THE ISSUE OF THE SUFFICIENCY OF THE SECOND AMENDED INFORMATION IS NOT PROPERLY BEFORE THE COURT.

In his Statement of Additional Grounds to the Court of Appeals, petitioner raised three issues:

1. Did the State file confusing and ambiguous charging information against [petitioner]?

2. Did [petitioner] violate the DOMESTIC VIOLENCE COURT ORDER, as charged on June 3, 2005?

3. Did the State improperly amend the charging information against [petitioner] during trial after statements to the jury involved "assault" in prior charging papers?

In his Petition for Review, petitioner raised two issues:

1. Permitting the State to amend the information after it had rested its case-in-chief was contrary to the decisions of this Court and inconsistent with constitutional standards for proper charging.

2. This Court should grant review of the issues presented in petitioner's Statement of Additional Grounds including flaws in the charging document and sufficiency of the evidence.

RAP 13.7(b) limits the scope of review to "Only the questions raised in the . . . petition for review and answer, unless the Supreme Court orders otherwise upon granting the motion or petition." State v. Korum, 157 Wn.2d 614, 624-25, 141 P.3d 13 (2006) (emphasis added).

The question of the sufficiency of the second amended information had not been raised when this Court granted the Petition for Review. It is not properly before this Court.

C. "WILLFUL CONTACT" IS NOT AN ELEMENT OF VIOLATION OF A COURT ORDER AS PROSCRIBED BY RCW 26.50.110(1)(a)(i).

Should this Court reach the merits of petitioner's allegation that the second amended information is insufficient, he is not entitled to relief.

To be sufficient, a charging document must "allege facts supporting every element of the offense[.]" State v. Leach, 113

Wn.2d 679, 689, 782 P.2d 552 (1989). "When challenged for the first time on appeal charging documents are liberally construed in favor of validity." State v. Tandecki, 153 Wn.2d 842, 848-49, 109 P.3d 398 (2005). This Court has adopted a two part test for sufficiency:

> (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice.

State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991).

Applying that test set out in Kjorsvik, the information here was sufficient to meet this post-conviction challenge.

> Whenever an order is granted under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, . . . and the respondent or person to be restrained knows of the order, a violation of any of the following provisions of the order is a gross misdemeanor, except as provided in subsections (4) and (5) of this section:
>
> (i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party
>
> (ii) A provision excluding the person from a residence, workplace, school, or day care;
>
> (iii)A provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location; or
>
> (iv) A provision of a foreign protection order specifically indicating that a violation will be a crime.

RCW 26.50.110(1)(a).

The elements of the crime of violation of a domestic violence protection order are:

> (1) That on or about _____(date)____ the defendant violated the provision of a protection order that . . . restrained him from having contact with ____(name of person who obtained protection order)_____;
>
> (2) That the defendant knew of the existence of the protection order; and
>
> (3) That the acts occurred in the State of Washington.

WPIC 36.53. These elements tract the language of RCW 26.50.110(1)(a).

The second amended information alleged that (1) the defendant violated the provisions of two protection orders that restrained him from having contact with the victim; (2) the defendant knew of the existence of the order; and (3) the crime was committed in the State of Washington. The information contained all the elements of a violation or RCW 26.50.110(1)(a)(i). It was clearly sufficient to withstand a post-verdict challenge.

Petitioner asserts that the essential elements of violating a no-contact order are: "(1) willful contact with another, (2) the prohibition of such contact by a valid no-contact order, and (3) the defendant's knowledge of the no-contact order." Supplemental Brief of Petitioner 15-16. Petitioner relies on State v. Clowes, 104 Wn.

App. 935, 944, 18 P.3d 596 (2001) to support this assertion. That reliance is misplaced.

First, the statute interpreted in determining the elements of violation of a no-contact order was RCW 10.99.050. Clowes, 104 Wn. App. at 942 n. 3. That statute provides: "Willful violation of a court order issued under this section is punishable under RCW 26.50.110. RCW 10.99.050(2)(a). Second, the Court of Appeals was reviewing the sufficiency of the "to convict" instructions, not the charging language. The information followed the language of RCW 10.99.050 and required a willful contact. Id. Given the different statutory language, Clowes is not controlling here.

The issue in this case is controlled by the legal reasoning in State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190 (2004). There, this Court determined that "[t]he legislature has the authority to create a crime without a mens rea element." Bradshaw, 152 Wn.2d at 532. This Court noted that "[t]he omission of the words with intent evidences a desire to make mere possession or control [of a controlled substance] a crime." Id., quoting State v. Henken, 50 Wn. 2d 809, 812, 314 P.2d 645 (1957) (emphasis in the original).

Likewise, RCW 10.99.050 clearly requires a willful violation. The absence of the words "willful violation" evidences the

legislature's desire to make criminal any contact in violation of a domestic violence court order.

Further, while there is no mens rea, there is still a requirement of a volitional act.

> At all events, it is clear that criminal liability requires that the activity in question be voluntary. The deterrent function of the criminal law would not be served by imposing sanctions for involuntary action, as such action cannot be deterred. Likewise, assuming revenge or retribution to be a legitimate purpose of punishment, there would appear to be no reason to impose punishment on this basis as to those whose actions were not voluntary.

1 Wayne R. La Fave, Substantive Criminal Law § 6.1(c), at 425-26 (2nd ed. 2003). This would permit a defendant who came into accidental contact in violation of a court order to assert an affirmative defense of unwitting contact. See Bradshaw, 152 Wn.2d at 538 (unwitting possession is a defense to possession of a controlled substance).

This Court has recognized that the elements of a violation of RCW 10.99.505 are different from those of a violation of RCW 26.50.110. Compare WPIC 36.51[1] with WPIC 36.53. "Willful

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[1] (1) That on or about _____(date)_____ the defendant willfully had contact with ___(name of victim)___;(2) That such contact was prohibited by a no-contact order; (3) That the defendant knew of the existence of the no-contact order; (4) That the acts occurred in the State of Washington.

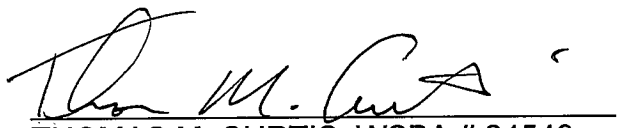
contact" is not an element of violation of RCW 26.50.110(1)(a)(i).

Since the language of the information alleges facts supporting every element of the crime of violation of a domestic violence protection order, it is sufficient to withstand this post-verdict challenge.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted this 6th day of May, 2008.



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